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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-173

DANIEL STEVENS,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri

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To the Supreme Court of the State of Missouri

Daniel Stevens, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Missouri entered in the above-entitled cause on May 10, 1971.

OPINIONS BELOW

This cause was decided by Division No. Two of the Supreme Court of the State of Missouri on April 12, 1971. The opinion is reproduced as Appendix A hereof. It is reported at 467 SW2d 10.

JURISDICTION

The judgment of the Supreme Court of the State of Missouri was entered on April 12, 1971. See Appendix B. A timely Motion for Rehearing or, in the Alternative, to Transfer to the Court En Banc, was overruled on May 10, 1971, by the Supreme Court of th State of Missouri. See Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3), and Rule 191(a) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I

Whether, under the Sixth Amendment of the Constitution of the United States, the Prosecution may use at trial evidence obtained as a result of the search of the Petitioner's body, when the search was made while the Petitioner was confined but represented and without court order, and no opportunity was given to the Petitioner's counsel to object to the said search.

II

Whether, under the Fifth and Sixth Amendments of the Constitution of the United States, as interpreted by Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, and In Re Gault, 387 U. S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428, the Prosecution may use at trial certain statements made by the Petitioner during custodial interrogation when neither the Petitioner nor his parents made an actual knowing and intelligent waiver of his rights to remain silent and his right to counsel.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I

Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.

II

Fifth Amendment to the Constitution of the United States:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

III

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT

Petitioner was charged in an Indictment with murder. At the time of the murder, Petitioner was fourteen years of age, and was subject to the provisions of the Juvenile Code of the State of Missouri. The Circuit Court of the County of St. Louis, Juvenile Division, certified Petitioner to be tried as an adult. Petitioner was convicted of second degree murder, and when the jury could not agree on the punishment, the Court assessed the punishment at life imprisonment. The Supreme Court of the State of Missouri affirmed this conviction on April 12, 1971, and denied Petitioner's Motion for Rehearing or, in the Alternative, to Transfer to the Court En Banc, on May 10, 1971.

The facts material to the consideration of the first question presented are that, during the course of the trial in this cause, a certain doctor was called to the stand to testify concerning the extraction of Petitioner's blood. The said extraction occurred long after the Petitioner had been arrested and long after Petitioner's counsel had entered his appearance, and his representation of Petitioner was a well-known fact. The Petitioner was himself confined at the time of this extraction process. In the Court of first instance, Petitioner's counsel objected in a timely manner to the testimony of this doctor upon the grounds that the Petitioner's counsel had not been previously notified of this blood extraction process, pursuant to Massiah v. United States, 377 U. S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199. This objection was raised in the form of a Motion to Suppress, and evidence was adduced at an interlocutory hearing. After the interlocutory hearing, the Motion was denied. The first question was preserved for appeal by Petitioner when his Motion for New Trial was filed and alleged as error both the testimony of the

doctor relative to the blood extraction and the introduction of the information about the blood itself. Said Motion for New Trial was denied by the Court of first instance, and an appeal was taken to the Supreme Court of the State of Missouri. The error alleged in the Motion for New Trial was briefed on appeal, with the Supreme Court of the State of Missouri finding against the Petitioner in regard to this question. Petitioner again raised this question before the Supreme Court of the State of Missouri in his Motion for Rehearing or, in the Alternative, to Transfer to the Court En Banc. Said Motion was overruled on May 12, 1971.

The testimony relative to the assignment of error claimed, appears at pages 663 through 681 of the transcript and is set out in full in Appendix D attached hereto.

The facts material to the consideration of the second question presented are that, at the trial, a witness was called to testify as to statements made by Petitioner during the course of a custodial interrogation the evening of Petitioner's arrest. Petitioner's counsel asked for an interlocutory hearing to determine the voluntariness of Petitioner's statement and also whether a knowing and intelligent waiver of his right to remain silent and his right to counsel had been made by Petitioner. At the interlocutory hearing, the interrogating officer was called to the stand and questioned as follows:

> Question: "Well, did you ask him—strike that. You told him he could have a lawyer?"
>
> Answer: "Yes, sir."
>
> Question: "And what did he say?"
>
> Answer: "Indicated; he didn't say."

Further in the examination of the interrogating officer the following occurred:

Question: "No, we are talking about him. Did the boy say to you he did not want a lawyer?"
Answer: "No, sir."
Question: "Did he say that he wanted to talk to you and tell you something?"
Answer: "Now from the conversation, certainly he wanted to talk to me."
Question: "Now wait just a second; I just asked you a question, Captain. I asked you this; did the boy say that he wanted to speak to you?"
Answer: "I don't know. I don't recall verbatim, but from the conversation, yes, he wanted to talk to me."
Question: "What was his conversation? What did he tell you?"
Answer: "Answered my quesicns. And I asked him if he understood what I was saying, and he says, 'Yes, sir.' Then of course you want to answer my questions?" and he says, 'Yes, sir.' "

Petitioner's counsel objected to the introduction of statements made by the Petitioner during this custodial interrogation on the grounds that this particular custodial interrogation violated the strictures laid down in the case of In Re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428, which extended to juveniles the right to remain silent. The Court overruled Petitioner's objection, and the statements were introduced into evidence. The statements which were introduced into evidence were incriminating in that they admitted ownership of certain shirts and gloves found near the scene of the crime and circumstantially placed Petitioner in the vicinity of the said crime. The testimony relative to the assignment of error claimed, appears at pages 236 through 248 of the transcript and is set out in full in Appendix E attached hereto. Petitioner preserved for appeal his objection to the introduction into evidence of the statements made by the Defendant concerning the shirts and gloves when, in his Motion for New

Trial, he alleged that it was error for the Court to introduce the said statements. The Court of first instance overruled this Motion for New Trial, and Petitioner appealed to the Supreme Court of the State of Missouri, once again alleging in his brief the error concerning the statements made by the Defendant. The Supreme Court of the State of Missouri ruled against your Petitioner on this particular allegation in its opinion and judgment handed down on April 12, 1971. Petitioner once again raised this particular question in a timely and proper manner by filing his Motion for Rehearing or, in the Alternative, to Transfer to the Court En Banc. Said Motion was overruled on May 10, 1971.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the State of Missouri has rendered a decision which is in conflict with the Constitution of the United States as interpreted by the Supreme Court of the United States thus raising certain federal questions which should be reviewed by the Supreme Court of the United States.

With respect to the first question presented for review, namely, whether, under the Sixth Amendment of the Constitution of the United States, the Prosecution may use at trial evidence obtained as a result of the search of the Petitioner's body, when the search was made while the Petitioner was confined but represented and without court order, and no notice was given to Petitioner's counsel, and no opportunity was given to Petitioner's counsel to object to the said search, it is to be noted that the case of Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826, made blood extraction a search of the body. That case held, however, that extraction of the blood did not violate the accused's privilege against self-incrimination, given the emergency circumstances of the

facts in that case. However, blood extraction for purposes, not of determining alcoholic content, but rather for determinations as to type, are not subject to the emergency rationale which was presented in the Schmerber decision. Rather a search of the body by means of extracting blood for the purposes of typing have been held to come within the safeguards of the Fourth Amendment. See, for example, Graves v. Beto, 424 Fed. 2d 524. If such a search is subject to the Fourth Amendment rights, then the Petitioner has a right to demand that a search warrant be obtained before his body be searched. This was not done in the situation presented by the case at bar; but, if a search warrant were to be sought, basic fairness and the Sixth Amendment right to the assistance of counsel require that notice be given to the counsel representing the accused. Massiah v. United States, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199, demanded the same when dealing with the particular facts raised in that case wherein an accused's out-of-court statements were said to violate his constitutional privilege against self-incrimination when they had been deliberately elicited from him after he had been indicted and in the absence of his retained counsel. Clearly, at the time that the blood of Petitioner was extracted in this case, he was entitled to a lawyer's help; for our Constitution has provisions concerning not only self-incriminating statements but also unreasonable searches and seizures. The holding of Massiah v. United States would protect against searches of a represented accused as much as it protects against interrogation of a represented accused. Petitioner is not arguing that the Prosecution cannot search an accused person; Petitioner is merely arguing that in order for a search of the accused person to be had, it must be done in accordance with legal process. The Constitution of the United States protects against unreasonable searches and provides a means whereby a search warrant may be ob-

tained by the Prosecuting authorities. In the case under consideration, the accused was confined, and therefore entirely within the care, custody and control of the State; thus the State was not presented with an emergency and it could easily have sought a search warrant. In seeking the search warrant, however, the Prosecution would have been compelled to oppose your Petitioner's counsel and a Magistrate may well not have granted a search warrant. Assuming, however, that a Magistrate did issue a warrant for a search of Petitioner's person, counsel for the Petitioner would at least have had notice that the search was going to occur. With the due notice, Petitioner's counsel might well have hired his own experts to perform the same examinations and tests as those performed by the prosecuting authorities. This would have produced a confrontation of expert evidence wherein the Prosecution's evidence was set against the evidence of the accused, with the classic benefits obtained from such confrontation. In a time when an accused's guilt or innocence can be dependent upon scientific analyses, basic justice demands that the accused's attorney have notice that the Prosecuting authorities are going to make these scientific analyses upon the accused's person so that the defense attorney may arm himself with his own expert scientific analyses with which to counter those of the prosecuting authorities. As this Court has stated in the case of Powell v. Alabama, 287 U.S. 45, 77 L. Ed. 158, 58 S. Ct. 55:

> ". . . during perhaps the most critical period of the proceedings, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough investigation and preparation [are] vitally important, the defendants are as much entitled to such aid [of counsel] during that period as at the trial itself."

Ibid. 57, 77 L. Ed. 167. An accused's counsel should have an opportunity to object to a search and he should be given notice of any lawful search so that he may, if he so desires, attempt to obtain for himself evidence with which to counter that which will be used by the Prosecution in its efforts to convict his client.

With respect to the second question presented; namely, whether, under the Fifth and Sixth Amendments of the Constitution of the United States, as interpreted by Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, and In Re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428, the Prosecution may use at trial certain statements made by the Petitioner during custodial interrogation when neither the Petitioner nor his parents made an actual knowing and intelligent waiver of his right to remain silent and his right to counsel, the record would indicate that on this particular question, no waiver was made. The interrogating officer indicated in his testimony that he told this then fourteen year old Petitioner that the officer was going to give the Petitioner his rights and then continued the interrogation. Nowhere does the testimony of the interrogating officer indicate that there was, in fact, a knowing and intelligent waiver of any of the rights of the Defendant, either the right to remain silent or the right to an attorney. As was stated in Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, at page 724 of the Lawyers Edition:

> ". . . If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the Defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid

> waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . . The record must show, or there must be an allegation and evidence which show, that accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

The testimony of the arresting officer in this case did not convincingly show that the Petitioner understood his rights. It is clear from the testimony of the arresting officer, however, that Petitioner never made an actual waiver of his rights and therefore he never made a knowing or intelligent waiver of his rights. What the evidence did show is that, upon completion of giving Petitioner his rights, the arresting officer proceeded directly to question the Petitioner without awaiting any actual or knowing or intelligent waiver of Petitioner's rights by Petitioner or Petitioner's parents.

We respectfully submit that the Supreme Court of the State of Missouri has incorrectly applied the Constitution of the United States, particularly the Fourth, Fifth and Sixth Amendments thereto, as interpreted by this Honorable Court in the Miranda, Massiah, and Gault decisions.

CONCLUSION

Therefore, it is respectfully submitted that this petition for certiorari should be sustained.

Respectfully submitted

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APPENDIX A

Opinion

(Filed April 12, 1971)

In the Supreme Court of Missouri
Division Number Two

State of Missouri,
Respondent,

v.

Daniel Stevens,
Appellant.

No. 55 295.

Appeal From the Circuit Court of St. Louis County
The Honorable Herbert Lasky, Judge

Appellant was convicted of second degree murder, and when the jury could not agree on the punishment, the court assessed and declared the punishment at life imprisonment. We affirm.

About 1:30 o'clock of the afternoon of November 25, 1968 a nephew of Mrs. Elizabeth Abbott discovered her partially nude body on the floor of her home at 233 Dennison, Ballwin, Missouri. She had been beaten repeatedly over the head with a six-pound metal barbell designed for exercise purposes.

On July 31, 1969 an indictment was filed in which appellant was charged with the murder of Mrs. Abbott. At the time of the murder appellant was fourteen years of age, and was subject to the provisions of Chapter 211 (all statutory references are to RSMo 1969, V.A.M.S.), the

Juvenile Code. The transcript before us does not so show, but presumably the Juvenile Court determined that appellant was not a proper subject to be dealt with under the Juvenile Code and that he should be prosecuted under the general law. There is no challenge on this appeal to such prosecution.

We will state generally the circumstances which led to the arrest of appellant and certain subsequent events and circumstances, and will set forth such additional facts deemed advisable in the discussion of the contentions presented on this appeal.

Appellant was a next door neighbor to Mrs. Abbott, and on the day of the crime had remained away from the Crestwood Junior High School because his younger brother was ill. The day following the crime, investigating police officers found in a multiflora rosebush near appellant's residence a pair of gloves and also a yellow shirt of the same size and same brand name of a blue shirt which belonged to appellant. He admitted he had a pair of gloves and shirt similar to those found, but said he had thrown the shirt in a trash can the morning of the murder, and that several days earlier he had lost the gloves at school. Stains on the shirt and on one of the gloves were of human blood Type O. The deceased's blood was Type O, and appellant's blood was Type A positive. The barbell was found lying next to the body of the deceased. On it there were fabric or glove impressions but no fingerprints. Strands of hair found on the right hand glove were submitted to a neutron activation analysis. One was found to have come from appellant and the other from the deceased.

About two o'clock of the afternoon of the day following the murder Police Officers Zimmerly and Binggeli talked to appellant in the principal's office at school. Officer Binggeli noticed a spot on the insole of his right

shoe. With appellant's permission he took a scraping of it, and he also scraped some material from beneath appellant's fingernails. A chemical analysis showed human blood in the shoe scraping, but because of the insufficiency of the sample the type could not be determined. The fingernail scrapings showed the presence of blood, but again due to the insufficiency of the sample it could not be determined that it was human blood. Appellant was placed under arrest above five o'clock of November 26, and was immediately delivered by the police officers to the St. Louis County Juvenile Detention Center.

By appellant's points IV and XI he asserts that prejudicial error resulted when the court permitted Dr. Varkey Phillip to testify that at the request of the police he had taken a sample of blood from appellant, and in admitting into evidence Exhibit No. 58, the report of the analysis of appellant's blood which showed it to be Type A positive. The basis of the contentions is that although appellant was represented by counsel at the time the blood sample was extracted, counsel was not notified and was not present. Appellant relies on Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246, and he attempts to distinguish Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908.

Apparently recognizing that Schmerber v. State of California, supra, has laid to rest as without merit the contentions that the taking in a reasonable and medically accepted manner of a blood sample from a person under arrest violates due process or the privilege against self-incrimination, or constitutes an unreasonable search and seizure, appellant seeks to equate the factual situation here to that in Massiah v. United States, supra. In that case, with the cooperation of a co-indictee, federal authorities listened unbeknownst to defendant to a conversation between defendant and the co-indictee, and incriminating statements of defendant so overheard were introduced

in evidence. It was held the accused was "denied the basic protections of [the Sixth Amendment, that 'In all criminal prosecutions, the accused shall enjoy the right • • • to have the Assistance of Counsel for his defense'] • • • when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Subsequently in the opinion, the court again emphasized that all that was ruled in that case was that "the defendant's own incriminating statements, obtained by federal agents under the circumstances • • • could not be used by the prosecution as evidence against him at his trial."

It was subsequent to the Massiah case that the Supreme Court of the United States decided the Schmerber case. There, in discussing the claim that the compulsory taking of a blood sample violated the protection of the Fifth Amendment against an accused being compelled to be a witness against himself, the court quoted from Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, that "'[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.'" It was then stated in the Schmerber case that "It is clear that the protection of the privilege [against being compelled to be a witness against himself] reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. • • • On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make

a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." The court then held that the taking of a sample of blood, even when without the consent of the defendant, did not involve "even a shadow of testimonial compulsion upon or enforced communication by the accused • • • either in the extraction [of the blood sample] or in the chemical analysis." The court then considered the claim that in compulsorily taking the blood sample, the accused's Sixth Amendment right to the assistance of counsel was violated. It held that its conclusion as to the claim of being compelled to be a witness against himself "answers" the claim that he was denied the right to counsel within the scope of the Sixth Amendment, but it was added that "No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." We consider that the Schmerber case rules the contention of appellant except insofar as it is premised on the absence of counsel at a **critical stage** of a criminal proceeding, a contention not specifically asserted in the point but presented in argument, and the Schmerber case apparently left open that question.

Appellant does not cite or rely on cases such as United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149, which hold that by reason of the Sixth Amendment a postindictment lineup is a critical stage at which an accused is entitled to have counsel present. However, in the Wade case, after ruling that a lineup is a critical stage the court commented on the argument that a lineup is merely a preparatory step in gathering evidence such as "systematized or scientific analyses of the accused's fingerprints, blood sample, clothing, hair, and the like." The court said: "We think there are differences which pre-

clude such stages being characterized as critical stages at which the accused has the right to the presence of counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." This reasoning would apply to the stage of withdrawing the blood sample as well as the analysis of the sample. We find no prejudicial error in the admission in evidence of the testimony of Dr. Phillip and of Exhibit No. 58.

By his points VIII and IX appellant asserts that prejudicial error resulted from the admission in evidence of Exhibit No. 43 and Exhibit No. 51.

Exhibits 43 and 51 were envelopes in which fingernail scrapings taken from appellant had been placed. Apparently the envelopes were offered in evidence to show the method of safekeeping and control until the scrapings were delivered to the chemist for analysis. Appellant's argument in his brief is on the basis that the exhibits consisted of the scrapings or the report of the chemist, and apparently the objection is also to any testimony concerning the taking of the scrapings and the result of the analysis by the chemist. We shall consider the scope of the point to extend to those matters. The basis of the contention, as so broadened, is that the scrapings were taken while appellant was in custody of the police, and while he did not have the benefit of counsel "who could

observe the manner in which [the scrapings were] obtained and what [they] looked like at the time * * * and [who] could observe the [appellant], his actions and emotional responses to the removing of the [scrapings]."

What we have said concerning the withdrawal of a blood sample applies equally to the taking of the fingernail scrapings. Appellant cites only the two cases, Massiah v. United States, supra, and Schmerber v. State of California, supra, which were cited and relied on in support of the previously ruled points IV and XI. We need not repeat what has previously been said in ruling those two points. That ruling governs the contentions here made.

By his point X appellant asserts that prejudicial error resulted from the admission in evidence of Exhibit No. 52 because it was "immaterial and irrelevant to the issues in the case." He cites Hungate v. Hudson, Mo., 185 S.W. 2d 646.

This point pertains to the scrapings of the spot on appellant's shoe taken by the police officer at the office of the school principal, which was before arrest. This exhibit, as the two previously discussed, was the envelope in which the scrapings had been placed. We treat the point, however, as encompassing the testimony concerning the taking of the sample and of the result of the analysis by the chemist.

Appellant merely asserts that the exhibit was immaterial and irrelevant without specifying any reason and without discussion. This was not the objection at trial. There appellant objected to the testimony concerning the taking of the scrapings on the ground that they were obtained "in violation of defendant's immunity against unreasonable search and seizures, and * * * giving evidence against himself." Although those reasons are not now advanced on this appeal, Schmerber v. State of Califor-

nia, supra, results in the objections made at trial being without merit. The objection now advanced, assuming it had been preserved for appellate consideration, also is without merit. Evidence of blood stains on the person or clothing of an accused in a prosecution involving violence to the person is relevant to the issue of guilt. State v. Kern, Mo., 447 S.W.2d 571; 40 C.J.S., Homicide, § 215d. In addition, even if we should assume that the evidence of the taking of the scrapings and of the result of the test was immaterial, "it is generally true that 'the admission in evidence of facts entirely immaterial to the issues and without probative force cannot constitute prejudicial or reversible error,' especially when the facts evidenced are of such character that they do not have a natural tendency to inflame or arouse hostile passions and their prejudicial effect is not otherwise made to appear." Hungate v. Hudson, supra. However, in the Hungate case the prejudicial effect was demonstrated, but in this case appellant makes no attempt to demonstrate prejudice.

Appellant's point II is that the trial court erred in admitting into evidence statements made by appellant "concerning certain shirts and gloves." Neither in the point nor in the argument in the brief does appellant set out the statements. However, we conclude that reference was intended to statements of appellant that he had a pair of gloves and a shirt similar to those found by the police officers, and that he had thrown the shirt away and had lost the gloves. Appellant asserts that the admission of these statements was error because (1) he did not waive his right to counsel, and (2) they were not admissible under the rules announced in State v. Arbeiter, Mo., 408 S.W. 2d 26, and State v. Arbeiter, Mo., 449 S.W. 2d 627.

In support of his first reason, appellant cites State v. McGee, Mo., 447 S.W.2d 270, which quoted from Miranda v. State of Arizona, 382 U.S. 925, 86 S.Ct. 320, 15 L.Ed.

2d 338, as follows: "Presuming waiver [of counsel at custodial interrogation] from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

During the testimony of Police Officer Gockel, who was one of the officers present when appellant made the statements concerning the gloves and the shirt, counsel for appellant requested and was granted an interlocutory hearing "relative to the admissibility of any statements taken from appellant while he was at the juvenile home." At this hearing Police Captain Nicholas Valenti testified that on the evening of November 26, 1968, he talked to appellant at the Juvenile Detention Center in the presence of his parents, a deputy prosecuting attorney and at least two other police officers. According to Captain Valenti, he first advised appellant of "his rights," including his right not to make a statement, and his right to have a lawyer and if his family could not afford a lawyer that the court would appoint one. He also warned appellant that any statement he made would be used against him. He then questioned appellant to determine his education and that he understood what had been told him. Captain Valenti testified that when he told appellant he could have a lawyer, he replied that he understood what was told him, but that appellant did not say by express words that he did or did not want a lawyer. However, Captain Valenti testified that from the conversation he understood that appellant "wanted to talk to me," and he replied, "Yes, sir," when asked if he wanted "to answer my questions." At the conclusion of the testimony of Captain Valenti, appellant's counsel moved that "Any testimony relative to what was said" by appellant to any police officers while he was "being treated as a juvenile" and while at the Juvenile Detention Center be

suppressed on the grounds that they were made "as a violation of the Missouri Juvenile Code" as interpreted by the first Arbeiter case, and also "the United States Supreme Court interpretation of a juvenile code in the matter known as the application of Gault." After some discussion and before any ruling was made, counsel for appellant called Robert Stevens, Sr., appellant's father, as a witness. Mr. Stevens testified that when appellant was brought into the room he asked him "to tell what happened that morning," and that Captain Valenti "did not question my son," but that he only "interrupted his conversation with me." Mr. Stevens further testified that while the police officers were there he asked appellant to to tell him what he did that day, and that "about every four or five words Valenti would butt in." He added that after he told appellant not to say anything more, there were no further answers made by him. This concluded the evidence at the interlocutory hearing, and no further or additional reasons were advanced in support of the motion to suppress. In the motion for new trial appellant's assignment of error did not expressly present the first of the two objections now asserted, that is, that presence of counsel was not waived, and when the trial court denied the motion to suppress it did not expressly rule whether the evidence affirmatively showed that presence of counsel was waived. This unquestionably resulted from the fact that the contention was not advanced as a reason to suppress.

We conclude that the first reason now advanced on this appeal in support of the contention that it was error to admit the statements is without merit for two reasons. First, the statements when offered in evidence were not objected to for the first reason now advanced, and a trial court is not to be held to have committed error in admitting testimony for a reason not presented to it. It is the procedural rule in this state that reasons urged in a

brief which were not advanced to the trial court are of no avail. State v. Davis, Mo., 251 S.W.2d 610, 616; State v. Hampton, Mo., 275 S.W.2d 356, 359. Such rule serves a legitimate state interest in the trial of a criminal case in that it prevents an accused from trapping the trial court by presenting to it an unmeritorious reason in support of an objection, and then presenting an entirely different reason to the appellate court. When such legitimate state interest exists, as here, the state may enforce the rule even though the reason advanced on appeal may pertain to some alleged federally protected constitutional right. Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408; State v. Harrington, Mo., 435 S.W.2d 318.

Our second reason is that the evidence at the interlocutory hearing clearly shows that appellant was offered counsel but intelligently and understandingly rejected the offer, and that a "silent record" is not relied on as a basis of presuming waiver of counsel at the interrogation. Appellant was twice told he was entitled to have counsel present, and that if his parents could not afford to employ counsel the court would appoint counsel. Appellant affirmatively stated that he understood his rights in this respect, and the second time appellant was told this his parents were present. To say that this was not an offer of counsel if desired is to place a technicality above all reasonable appraisal of the circumstances. In addition, after being offered counsel appellant affirmatively stated in the presence of his parents that he wanted to answer questions, and as demonstrating the voluntariness and the understanding on appellant's part, when his father told him to say nothing more, no further statement was made. Although the evidence supports a conclusion that it was appellant's father and not the police who interrogated him, and that it was at the father's suggestion that appellant said anything in the presence of the police officers, we do not base our conclusion on that circumstance because the

father also testified that Captain Valenti did "butt' in and ask questions. However, the presence of his parents adds a convincing circumstance that no unfair or improper advantage was taken of appellant, and that his statements were voluntarily made. We conclude that the record affirmatively demonstrates, as distinguished from a presumption based on a "silent record," that appellant voluntarily, intelligently and understandingly waived the right to the presence of counsel at the interrogation.

We also rule that the statements were not made in violation of the rules announced in either of the Arbeiter cases. In the first case (408 S.W.2d 26) a written confession was obtained from a fifteen-year-old person **before** he was turned over or delivered to the juvenile authorities as required by § 211.061. In that case the court expressly stated that the facts of that case did not call for it to "consider statements of a juvenile in response to questioning after § 211.061 has been complied with," which is the situation in this case. In the second Arbeiter case (449 S.W.2d 627) this court held inadmissible statements by an accused juvenile made to a juvenile officer without any warning of the consequences and at a time when the officer was talking in a "relaxed, nonadversary atmosphere." That is not the situation here.

Appellant's contention does not go beyond the assertion that the statements were inadmissible under the rules announced in the two Arbeiter cases, but for the reasons above set forth neither of those cases result in the statements not being admissible. The admissibility of the statements is governed by State v. Sinderson, Mo., 455 S.W.2d 486, a case which in many respects is remarkedly similar to this one. In addition, the cautionary statement in Gallegos v. State of Colorado, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325, pertaining to the presence of "a lawyer or an adult relative or friend" during interrogation of a fourteen-year-old accused juvenile was strictly observed

in this case. We conclude that no prejudicial error resulted from the admission in evidence of the statements.

Appellant's point III is that the court committed prejudicial error "in allowing into testimony [appellant's] statement, 'Are you sure I am the only one?' made to the police officers at the school." We note that in the assignment of error in the motion for new trial, appellant attributes this testimony to Donald Loehr, Chief of Police of Ballwin, Missouri. However, we find no testimony by him to this effect. We do find such testimony by Sergeant Beckett, and we shall treat his testimony as that to which this point pertains.

Chief Loehr, Officer Gockel, and Sergeant Beckett went to the Junior High School about five o'clock of the afternoon of November 26, 1968, and Chief Loehr advised appellant that he was being placed in custody for suspicion of homicide. Officer Gockel then advised appellant of his "rights under the Miranda decision" by reading from a card he removed from his pocket, and he then told appellant "not to make any statement to myself or any police officer until he arrived at the St. Louis Juvenile Detention Center." Appellant then started to walk down the hall, and appellant turned to Sergeant Beckett and said, "Are you sure I am the only one?" This statement, or question, was not made as the result of any question asked appellant by any of the police officers, but it was volunteered by appellant.

Appellant contends that at the time the above statement was made he had been taken into custody or had been deprived of his freedom in a significant way, and that the police knew he was a juvenile. Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974, is cited, and appellant argues that the admission in evidence of this statement was error for the same reasons advanced in point II, which were that ap-

pellant had not waived the presence of counsel at interrogation, and that the admission of the testimony violated the rules announced in the two Arbeiter cases.

We conclude that no error occurred. When Sergeant Beckett testified that appellant volunteered the above statement in the form of a question no objection whatever was made. In addition, on cross-examination, counsel for appellant went into the circumstances of appellant making the statement in considerable detail. Under these circumstances, the issue was not preserved for appellate review, State v. Richardson, Mo., 321 S.W.2d 423; State v. Terry, Mo., 325 S.W.2d 1, and absent plain error within the meaning of Supreme Court Rule 27.25, V.A.M.R., the issue should not be reviewed.

The admission in evidence of the testimony of Sergeant Beckett that appellant made the statement did not constitute plain error. In fact the testimony was proper. Volunteered statements to the police are not excluded by the ruling of Miranda v. State of Arizona, supra, and are not inadmissible on the ground that an accused did not waive his right to counsel at interrogation. Gregg v. State, Mo., 446 S.W.2d 630. In addition, neither the first nor second Arbeiter case makes the testimony inadmissible. In the first case (408 S.W.2d 26), the court stated that it did not have under consideration "the question of spontaneous statements by a juvenile prior to being taken before the juvenile judge or juvenile officer." The second case (449 S.W.2d 627) considered only the admissibility of a statement given by a juvenile to the juvenile officer without any warning of the consequences and at a time when the officer was talking in a "relaxed, nonadversary atmosphere." In State v. Sinderson, supra, it was held that statements made by a juvenile to police in an interrogation when in custody of the juvenile court, but after being fully advised of his constitutional

rights and being aware that the questioning authorities were his adversaries, were admissible in evidence. If such a statement is admissible, then certainly a volunteered statement after full advice of his constitutional rights would be admissible. We find no error for the reasons assigned, much less plain error affecting substantial rights.

Appellant asserts in points V and VI that the trial court committed prejudicial error in admitting into evidence the testimony of Thomas Mound and Ralph Turnbough concerning statements made by appellant while in the Juvenile Detention Center.

Thomas Mound, a fellow detainee of appellant, testified that during an argument at the dinner table appellant said that he would kick him "like I beat that woman's head in." Ralph Turnbough, another fellow detainee and appellant's roommate, testified that in a conversation appellant stated that he was there for murder and that he had beaten Mrs. Abbott over the head with a barbell approximately seventeen times.

Appellant asserts that § 211.271 (3) provides that "All evidence given in cases under this chapter, as well as reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceedings, civil or criminal, other than proceedings under this chapter." He also asserts that by reason of his request for the interlocutory hearing previously referred to, he objected to any evidence of statements by appellant to anyone while at the juvenile center.

We do not agree that by the request for an interlocutory hearing, an objection was made to this testimony. The motion was to suppress evidence of "any testimony relative to what was said to this officer or other officers

in the juvenile home," and on the ground that the testimony of Captain Valenti as to statements of defendant made to him was a violation of the Juvenile Code. When the testimony of Thomas Mound and Ralph Turnbough was offered no objection whatever was made, and the issue is not preserved for appellate review. However, assuming a valid and sufficient objection on any basis now advanced, it would have been without merit. Miranda v. State of Arizona, supra, does not apply to statements made to non-police personnel under circumstances not amounting to custodial interrogation by police officers. State v. Kelly, Mo., 439 S.W.2d 487. Appellant's reference to § 211.271 (3) is without merit. The statements of appellant testified to by the two fellow detainees were not "admissions, confessions [or] • • • statements • • • to the juvenile officer [or] juvenile court personnel," nor did they constitute "evidence given" in a case under any part of the Juvenile Code, and therefore they were not rendered inadmissible as evidence by reason of § 211.271 (3). They were voluntary statements made to non-police and non-juvenile court personnel, and constituted declarations against interest, and as such were admissible in evidence.

Appellant's Point I is that the trial court erred in "allowing into evidence the testimony of [Officer] Gockel that after he and the Chief of Police Loehr had a conversation with Mrs. Shirley Stevens, mother of [appellant], they proceeded to the high school and arrested [appellant]."

On November 26, 1968, the day following the murder, Chief Loehr and Officer Gockel recovered a yellow shirt and pair of gloves from a multiflora rosebush. The shirt and gloves were shown to appellant's mother, and after "a conversation" with her, Officer Gockel went to appellant's bedroom with appellant's brother and obtained a blue shirt which Mrs. Stevens told him he could keep.

What was said in the "conversation" is not shown, but appellant objected to the question of whether there was a conversation because "that is hearsay," and also because the question called for a conclusion that the conversation was about the yellow shirt. This objection was overruled, and the answer was "yes". Appellant also objected to the question of whether they went "to any other part of the house" after Mrs. Stevens was shown the yellow shirt on the ground that it called for hearsay. In the discussion out of the hearing of the jury reference was made to State v. Chernick, Mo., 278 S.W.2d 741. After considerable discussion the objection was overruled, and Officer Gockel testified about obtaining the blue shirt, and that the shirts and the gloves were subsequently turned over to the police laboratory. Officer Gockel then testified without objection that he and Chief Loehr left the Stevens residence about 4:30 o'clock and went to the Crestwood Junior High School, and that appellant "was taken into protective custody and charged with homicide."

We consider this point to be without merit for two reasons. First, after the witness testified that a conversation was had with appellant's mother, there was no objection to the testimony that the officers then went to the high school and arrested appellant. See the cases cited supra as to the need for objections to testimony to preserve the matter for appellate review.

Second, the testimony was not objectionable. Appellant cites and relies on State v. Chernick, Mo., 278 S.W.2d 741, supra, and State v. Blockton, Mo., 394 S.W.2d 323. In the Chernick case several persons were involved in a robbery and one was captured at the scene. The prosecutor was permitted to testify over objection that he interviewed the captured participant and then "we put an arrest order out for Glenn Chernick." In addition, in oral argument

the State argued strongly that this was a circumstance which showed Chernick's involvement. In the Blockton case, a police officer testified that he saw two men flee from a scene of a robbery, that they had fired at him, and that one had been captured. He then testified over objection that he had "learned [the name of defendant] from Otto Woods," the captured participant. In each case it was held that statements of one co-conspirator or a co-actor made prior to the formation or after the consummation of the unlawful combination is hearsay, and that they are not binding upon the co-conspirator or co-actor who is on trial. That is not the situation in this case. There is no contention or intimation that Mrs. Stevens was a co-conspirator or co-actor. In addition, if it be considered that statements made by Mrs. Stevens would have been hearsay as to appellant, there was no statement attributed to her which implicated appellant, nor did the witness testify to any information received from her (as the statement of the co-participant's name in the Brockton case), or that he did anything which necessarily was premised upon information orally communicated by appellant's mother (as the statement in the Chernick case).

By appellant's points VII and XI he contends that prejudicial error resulted when the court permitted Dr. James R. Vogt to testify "relative to his findings based upon computer tabulated data which he obtained after placing certain items of evidence in a nuclear reactor," and in admitting into evidence Exhibits 66 through 85.

Dr. James Vogt, assistant professor of nuclear engineering at the University of Missouri at Columbia described in detail the process of neutron activation analysis. We shall not attempt to set forth in detail his explanation of the process, but what seems to be an adequate explanation, at least to a layman, of its development, means of operation, and uses can be had in an article entitled "Identification of Substances by Neutron Activation Aanlysis" by Robert

and Joan Watkins in 15 Am. Jur., Proof of Facts, p. 115. See also Vol. 9 Journal of Forensic Sciences p. 119. It may briefly be stated that the process used by Dr. Vogt consisted of placing the sample of a substance to be tested in a nuclear reactor where it was bombarded with neutrons and made radioactive. The sample was then placed in a sodium iodide scintillation detector, where gamma rays radiated from the radioactive sample interacted with the sodium iodide to produce light pulses, which when amplified by a photo-multiplier tube, could be analyzed and a graph or chart made from which could be determined the kind and amount of elements in the sample. Samples from the same source, for example of hair taken from the same individual, produce identical graphs or charts, while a sample of hair taken from some other person, although containing the same elements, produces a different pattern on the graph or chart.

Dr. Vogt testified that he had subjected to neutron activation analysis (1) two samples of hair which had been taken from one of the gloves that was found near appellant's house; (2) a sample of hair taken from the yellow shirt which was found with the gloves; (3) a sample of hair from appellant's head; (4) a sample of hair taken from a hair roller used by the deceased, and admittedly her hair; (5) a sample of hair found in the hallway of deceased's house; (6) samples of threads used in sewing the hem of the sleeves of the yellow and blue shirts; and (7) samples of thread used in sewing the sleeve to the shoulder of the yellow and blue shirts. Based on the results of the neutron activation analysis, and his reading of the graphs produced thereby, Dr. Vogt testified that in his opinion (1) the sample of hair from the roller, the sample of hair found in the hall, one of the samples of hair found on the glove, and the sample of hair found on the yellow shirt were all from the same source, that is, the same person; (2) that the sample of the second hair found

on the glove and the sample of hair from appellant's head came from the same source; and (3) the thread from the shoulder of the yellow shirt was not the same as the thread from the shoulder of the blue shirt, but that the thread used in sewing the hem of the sleeves of both shirts were the same.

The conclusion sought to be presented by this testimony concerning the identity of the samples of hair, when considered with other testimony, was that on appellant's glove were found strands of hair, one of which came from him and the other from the deceased. As to the tests on the thread, there was testimony that when the yellow and blue shirts were purchased, they were long sleeved, but that appellant's mother had cut the sleeves off and hemmed them. The conclusion sought to be presented was that the yellow shirt, on which blood stains and a hair from the deceased were found, was appellant's shirt.

In his challenge to the testimony of Dr. Vogt and to the admission in evidence of Exhibits 66 through 85 (which were the hair and thread samples and the graphs produced in the tests) appellant first contends that the qualification of Dr. Vogt as an expert was not established.

In order for a witness to be qualified as an export, "it must appear that by reason of education or specialized experience he possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or drawing correct conclusions." Shelby County R-IV School District v. Herman, Mo., 392 S.W.2d 609, 616. The determination of whether a witness meets the qualifications of an expert so that he may express an opinion rests largely in the discretion of the trial court, State v. Terry, Mo., 325 S.W.2d 1, although such determination is reviewable on appeal on the issue of abuse of that discretion. State v. Menard, Mo., 331 S.W.2d 521.

The record clearly shows that Dr. Vogt was educated and experienced in the special field of nuclear physics, and that he had extensive experience in neutron activation analysis of various materials, including the testing of hair. No discussion is needed to conclude that the subjects of nuclear physics and neutron activation analysis are of the nature that persons having no specialized training are incapable of drawing correct conclusions. The trial court did not abuse its discretion in its determination that Dr. Vogt was an expert witness.

Appellant next contends that there was no evidence that the machines or apparatus used in making the tests were functioning properly when the tests were conducted. We note that appellant does not challenge the reliability of the process of neutron activation analysis or the accuracy of the scientific instruments used in making the tests and producing the graphs. We should state, however, that although the process is relatively new, it is not untried, and that testimony of the results of neutron activation analysis has been received in many cases. For example, in the 1970 Supplement to Vol. 15 Am. Jur., Proof of Facts, at p. 16, it is stated: "The enthusiastic use of neutron activation analysis (NAA) by a variety of federal government agencies has been largely responsible for the growing acceptance of such evidence in both federal and state courts." There is then listed 75 cases, including this case, wherein evidence of the results of neutron activation analysis was admitted in evidence. Turning back now to the contention of appellant, Dr. Vogt testified as to how the equipment was maintained and by whom. In addition, he stated that tests were conducted, both before and after the tests applicable to this case were made, to determine that the equipment was working properly. He had personally checked the accuracy of the computer at least every other day for a month prior to the tests made for this case by feeding into it known data and checking

the result with the known answer. This unquestionably established a prima facie case of accuracy and reliability. There is no evidence to the contrary.

Appellant's remaining challenge to the evidence of the neutron activation analysis is that he should have been notified in advance of the trial that the evidence would be offered. Dr. Vogt was indorsed as a witness, and in this way, which is all the State was required to do, appellant was so notified. Appellant relies on United States v. Kelly, 2 Cir., 420 F.2d 26. That case does not support his contention. The defendants in that case moved for discovery of the results of certain tests conducted by the government, and the court ordered the disclosure of those tests. Thereafter, a neutron activation test was conducted and defendants were not informed of the results. The court held that the Federal Rules of Criminal Procedure imposed a continuing duty to disclose subsequently made tests.

It may be that after discovering from Dr. Vogt prior to trial the nature of his testimony, upon request the trial court would have directed that appellant be informed of the results, but error cannot be predicated upon a failure to advise appellant of the results when no request therefor was made. In addition, there was no wrongful concealment of the fact of the tests or the results.

Appellant's point XIII is that the court erred in admitting into evidence Exhibit 89, which was a black and white photograph of the body of the deceased, because, as asserted in his brief, it was "a particularly bloody and gruesome picture which displayed to the jury the battered remains of the deceased." The photograph shows the body of the deceased lying face down on the floor, bare from the waist down, with an overcoat covering the upper portion of the body. The photograph also shows blood

on the head, and a barbell lying next to the body, partially hidden by the overcoat. The trial court admitted the exhibit over appellant's objection on the basis that it explained the testimony of a witness who said that when he entered the house he could not see the face of the deceased, and that he did not see the barbell.

The admission of a photograph of the body of the deceased in a homicide prosecution rests within the sound discretion of the trial court, and it is properly admitted when it tends to show some fact or circumstance material to the case, such as the nature and location of the fatal wound, State v. Moore, Mo., 303 S.W.2d 60; or when it enables the jury to better understand the fact and the testimony of witnesses, State v. Thresher, Mo., 350 S.W.2d 1, or tends to corroborate, explain or clarify the testimony of witnesses, State v. Edwards, Mo., 435 S.W.2d 1. The photograph was helpful to a better understanding of the facts, and the testimony of some of the witnesses, and therefore was material. It is not made inadmissible because witnesses may have orally described what is shown by the picture, State v. Spica, Mo., 389 S.W.2d 35, or because it presents a gruesome sight, State v. Moore, supra. If photographic views are shocking, when presenting an accurate picture, it is because the crime is one of that sort, whether described in words or pictures. The court did not abuse its discretion.

Point XIV is that the court erred in overruling appellant's motion for acquittal at the end of the State's case. This is of no merit for two reasons. First, appellant waived any error by presenting evidence on his behalf. State v. Hill, Mo., 438 S.W.2d 244. Second, the State had clearly made a submissible case of second degree murder, of which he was found guilty, and in his motion for new trial appellant does not assign as error that the evidence was insufficient to support the verdict rendered.

By his point XV appellant asserts that the court erred in instructing the jury on second degree murder because he was guilty of first degree murder or guilty of nothing, and by his point XVII he asserts that if it was not error to give such an instruction, then it was error to refuse to give an instruction on manslaughter.

The immediate answer to point XV is that the evidence authorized a finding of second degree murder. The principal distinction between first and second degree murder is the element of deliberation. " 'The general rule is that a presumption of murder in the second degree arises from an intentional killing of a human being by another where a deadly weapon is used by him at a vital part of the body, absent **proof** of other facts tending to show deliberation to raise such killing to first degree murder, or to show want of premeditation and malice to reduce the killing to manslaughter, * * *.' " State v. Williams, Mo., 442 S.W.2d 61. Under the evidence in this case the jury was justified in finding every element of first degree murder, except, in its judgment it could have believed that there was no deliberation. Certainly the evidence did not compel a finding of deliberation. In that event the offense was second degree murder, and the evidence supported the giving of the instruction.

As to point XVII, there is no **proof** of facts tending to show want of premeditation and malice, and after setting forth the statement above quoted, this court in State v. Williams, supra, added: "We emphasize that there must be **proof** of facts tending to show want of premeditation and malice to warrant an instruction on manslaughter." Appellant does not attempt to set forth any facts which he contends constituted such proof, and he cites no cases. There is no merit to either point.

In point XVIII appellant contends that prejudicial error resulted by the refusal of the court to give one of four

requested and tendered instructions on the weight to be given circumstantial evidence. Appellant cites State v. Irby, Mo., 423 S.W.2d 800, a case in which it was held that the evidence did not support the verdict, and State v. Thompson, Mo., 428 S.W.2d 742, and State v. Aguilar, Mo., 429 S.W.2d 754. The Aguilar case was wholly circumstantial as to the identity of the defendant as the one who committed the crime, and the Thompson case was wholly circumstantial as to whether the property in the possession of the defendant was the stolen property. Appellant's contention is that the evidence in this case tending to implicate him is wholly circumstantial.

Generally stated, when the State's case rests wholly upon circumstantial evidence, the accused, upon proper request, is entitled to have the trial court instruct the jury on the collateral issue as to the effect of or weight to be given by the jury to circumstantial evidence. State v. Regazzi, Mo., 379 S.W. 2d 575. However, the giving of such instruction is not mandatory when part of the evidence is direct. State v. Huff, 353 Mo. 791, 184 S.W.2d 447; State v. Loston, Mo., 234 S.W.2d 535. Admissions by the accused are direct evidence of his guilt. State v. Loston, supra; State v. Regazzi, supra; State v. Criger, Mo., 46 S.W.2d 537; State v. Spica, Mo., 389 S.W.2d 35, 53. In this case there was evidence that appellant had made admissions that he had killed Mrs. Abbott, and for that reason the trial court did not err in refusing the requested cautionary instructions pertaining to circumstantial evidence.

Appellant also contends that the rule of leaving to the discretion of the trial court whether the instruction should be given when there is direct evidence is arbitrary and unreasonable. We do not agree. In fact, an instruction such as those requested, would tend to be confusing when there also is direct evidence because the instruction cre-

ates a different test for the weight to be given, and would not be applicable to the direct evidence.

By his point XVI appellant challenges Instruction No. 6, on the issue of intent, and asserts error because (1) it permitted the jury to find intent by either direct or circumstantial evidence and the court did not instruct on circumstantial evidence, and (2) the instruction was either redundant or should have been included in the verdict directing instruction on second degree murder. We do not set out the instruction because an identical instruction is set out, and approved in State v. Deutschmann, Mo., 392 S.W.2d 279, at p. 283.

As previously ruled, it was not error in this case to refuse an instruction on circumstantial evidence, and as stated in State v. Deutschmann, supra, "intent need not be proved by direct testimony but may be inferred from the facts and circumstances." Therefore, the instruction properly advised the jury in this respect, and by giving it there did not arise a requirement that an instruction be given defining circumstantial evidence and the weight to be given to it. State v. Mulcony, Mo., 270 S.W. 375.

As to appellant's second argument, the verdict directing instruction did not define intent, and therefore Instruction No. 6 was not redundant or repetitious. In addition, it is not required that definitions be contained in the verdict directing instruction, but they may be in a separate instruction. State v. Brookshire, Mo., 368 S.W.2d 373, 383.

Appellant's last point, No. XIX, is that the court erred in refusing to instruct on motive, and to give one of several instructions tendered and requested. This contention is answered by State v. Taylor, Mo., 205 S.W.2d 734, a case in which the accused was found guilty of second degree murder, wherein it was said: "The court

refused accused's offered instructions on motive. Motive is not an element of crime and proof of it is not essential to sustain a conviction. * * * Accordingly an instruction on motive is not required. Proof of motive does have great probative force in determining guilt, especially in cases of circumstantial evidence. But since motive is merely a circumstance to be considered by the jury and not conclusive of accused's innocence or guilt, it need not be singled out by a special instruction. The court's action in refusing to instruct on motive was not error." See also State v. Koch, 322 Mo. 106, 16 S.W.2d 205; State v. Gregg, Mo., 399 S.W.2d 7.

The judgment is affirmed.

Alden A. Stockard,
Commissioner

Barrett, C., concurs

Pritchard, C., concurs

APPENDIX B

(Judgment)

No. 55,255

Circuit Court No. 303811

In the Supreme Court of Missouri

March Session, 1971

State of Missouri,
Respondent,

vs.

Daniel Stevens,
Appellant.

Appeal from the Circuit Court of St. Louis County

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis County rendered, be in all things affirmed, and that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. It is further considered and adjudged by the Court that the sentence pronounced against the said Daniel Stevens, appellant herein, by the said Circuit Court of St. Louis County be executed, and that the marshal of this court arrest the said Daniel Stevens without delay, wherever he may be found in this State, and deliver him to the Department of Corrections, Jefferson City, Missouri, to be con-

fined in the appropriate penal institution for and during the period of his natural life, the same being the sentence passed by the said Circuit Court of St. Louis County.

(Opinion filed.)

State of Missouri—Set.

I, Marion Spicer, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the March Session thereof, 1971, and on the 12th day of April, 1971, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 12th day of April, 1971.

Marion Spicer Clerk

..... D. C.

APPENDIX C

(Court Order)

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri
65101

Marion Spicer
Clerk

Telephone
636-3715

May 10, 1971

Shaw & Howlett
225 South Meramec Avenue
Clayton, Missouri 63105

In Re: State vs. Daniel Stevens
No. 55295

Gentlemen:

This is to advise the Court has this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing or in the alternative, to transfer to Court en Banc overruled."

Yours very truly

Marion Spicer
Clerk

cc—Attorney General

[663] **APPENDIX D**

(Testimony Relative to First Question Presented)

VARKEY PHILLIP, having been duly sworn, testified as follows:

Direct Examination

By Mr. Settich

Q. Will you state your name, please?

A. My name is Varkey Phillip.

Q. And your profession, sir?

A. I am a doctor at the St. Louis County Hospital, full time emergency room physician.

Q. And are you a doctor of medicine?

A. I am a surgeon; yes.

Q. And where did you obtain your medical degree, sir?

A. At the University of Madras, in India.

Q. And how long have you been a practicing doctor, sir?

A. Since 1963.

Q. All right. And how long have you been attached to the St. Louis County Hospital, sir.

A. Since '63; July.

Q. All right. And, Dr. Phillips, directing your [664] attention to July 2, 1969, was a man brought to you by the—or a youth brought to you by the name of Daniel Stevens?

A. Yes, sir.

Q. And did you do anything to Daniel Stevens on that day?

A. Yes, sir.

Q. And what was that, please?

A. I drew some blood from him.

Q. All right; and how did you draw the blood?

Mr. Shaw: Now would you step up just a minute?

(Whereupon counsel and reporter approached the bench and the following occurred out of hearing of the jury.)

Mr. Shaw: At this time the defense is going to ask for an interlocutory hearing on a motion to suppress this evidence. The defense, of course, did not know that such was going to be used until opening statement and did not file any motion prior to trial as to blood withdrawn from the defendant.

The Court: Very well, sir; leave granted.

(Whereupon counsel returned to their places and the following occurred within hearing of the jury.)

The Court: Mr. Bailiff, the jury is to return to the jury deliberation room; the court will remain in session.

(Whereupon the jury retired to their deliberation room and the following occurred in open court out of hearing of the jury.)

[665] (Whereupon the following occurred in interlocutory hearing.)

Examination

By Mr. Shaw

Q. Will you state your name, please?

A. My name is Varkey Phillip.

Q. And you are a resident of the St. Louis County Hospital?

A. Yes, sir.

Q. You are a medical doctor?

A. Right.

Q. And you received your medical degree where?

A. At the University of Madras in India.

Q. How many years do you attend college in India in order to get a medical degree?

A. Four and a half years in the medical school and four years of premedical before that.

Q. Now do you recognize the defendant, the young man who is seated here?

A. Not definitely; no.

Q. All right. You were asked if someone by the name of Daniel Stevens was brought to you for an examination at the St. Louis County Hospital.

A. Yes, sir.

Q. When was that?

A. On July 2, 1969.

Q. Doctor, who brought him to you?

A. I don't know their names but they were police officers.

Q. There was no lawyer present with him, was there?

A. Not that I know of.

[666] Q. There were just police officers?

A. I was asked by the director of the hospital, or informed that a patient would be brought for some blood to be drawn, and they were brought by police officers.

Q. You were informed that a patient would be brought to you for blood to be withdrawn; is that right?

A. Yes, sir; that's right.

Q. From that patient?

A. That's right, sir.

Q. How was this blood withdrawn?

A. The arm was prepared and I drew blood from the—we call the cubital fossa, which is this (indicating) middle third of the forearm.

Q. Was the patient asked if he wished to have blood withdrawn?

A. Yes, sir.

Q. And what did he say?

A. He said it was all right; he was very co-operative.

Q. And did you know how old he was?

A. Yes, sir.

Q. How old?

A. Fifteen years.

Q. Did you know that there was a criminal charge against him?

A. Yes, sir.

Q. Did you know that he had a lawyer at that time?

A. No, sir.

Q. Did anyone ask him whether or not he wanted his [667] lawyer to be present?

A. Not that I know of.

Q. And it was in the presence of two police officers?

A. Yes, sir.

Q. And yourself?

A. Yes, sir.

Q. And the boy here, at the St. Louis County Hospital?

A. Yes, sir.

Q. In July of 1969?

A. Yes, sir.

Q. That you withdrew blood from him?

A. Yes, sir.

Q. Did you tell him or did anyone in your presence tell him that that blood might be used in evidence against him in court?

A. I did not; no, sir.

Q. Did you hear anyone at the time you withdrew the blood say that?

A. No, sir.

Q. Did anyone in your presence tell him that he did not have to submit to having this blood withdrawn?

A. No, sir.

Q. Your answer is, "No, sir."

A. (Indicating yes.)

Q. Did anyone tell him that he could have the benefit of his lawyers being present at the time this was done?

A. No, sir.

Mr. Shaw: I have no further questions.

[668] **Examination**

By Mr. Settich

Q. Doctor, the method in which you had taken the blood from Daniel Stevens; was that method performed in a reasonable manner?

A. Yes, sir.

Mr. Shaw: Object; woops, woops. Object to that, Your Honor, as calling for conclusion that would invade your province.

The Court: As to what is reasonable is my province.

Find out how he extracted blood.

Q. (By Mr. Settich) Would you inform the Court, please, just how did you extract this blood?

A. His arm was cleaned with alcohol swab, a tourniquet was applied in the upper portion of the arm and with a sterile syringe and needle the blood was withdrawn from a vein in the forearm.

Q. I didn't understand after the tourniquet was made.

A. With a sterile syringe and needle the blood was withdrawn from the forearm.

Q. Now, Doctor, the fashion in which you have just told us you had taken blood from Daniel Stevens, is that the accepted medical practice in taking blood from individuals?

A. That is the standard procedure.

Q. And is that the standard procedure throughout the [669] medical profession as you know it, sir?

A. Yes, sir.

Q. Is there anything in your opinion, sir, that is in human or unreasonable in taking blood in that fashion?

A. No, sir.

Mr. Settich: I have no other questions.

The Court: All right; anything further of this witness?

Mr. Shaw: Not of this witness; no, sir.

The Court: You may step down, sir, and kindly wait outside until we call you.

CHARLES M. SHAW, having been duly sworn, testified for the interlocutory hearing, as follows:

Examination

By Mr. Howlett

Q. Would you state your name, please, sir?

The Court: For the record, identify yourself, please.

Mr. Howlett: Let the record show that my name is Joe Howlett, H-o-w-l-e-t-t, and that I will interrogate Mr. Shaw.

Mr. Shaw: And that he is a partner in my law firm.

Q. (By Mr. Howlett) Would you state your name, please, sir?

A. Charles M. Shaw.

[670] Q. And where do you reside, Mr. Shaw?

A. Well, I reside at Number 26 Portland in Frontenac, Missouri.

Q. What is your profession or occupation, sir?

A. I am a lawyer.

Q. How long have you been an attorney?

A. Since 1947.

Q. Where were you educated, sir?

A. Washington University in St. Louis.

Q. And were you licensed as an attorney in the State of Missouri?

A. Yes, sir.

Q. And is that licence in full force and effect today?

A. Yes, sir.

Q. And was it on the 2nd day of July, 1969?

A. It was.

Q. You are the attorney of record in this cause?

A. Yes, sir.

Q. All right. Now, on the 2nd day of July, 1969, and between November, 1968, and July of 1969, did you maintain an office in the County of St. Louis?

A. I did.

Q. And where is that office located?

A. 225 South Meramec Street in Clayton.

Q. All right. Now, do you recall when you entered your appearance as attorney in this cause?

A. Well, I have been the attorney for Daniel Stevens [671] since December of 1960, early in December.

Q. All right. And had you made appearances in the Juvenile Court in this cause on or before July of 1969?

A. Yes, sir.

Q. All right. Now, how many persons are associated with you in the practice of law in your office, Mr. Shaw?

A. There are three other lawyers who are associated with me.

Q. How many of those attorneys have worked on this lawsuit?

A. All of them.

Q. Now, at any time on or before July 2, 1969, did you receive any notice from anyone that the defendant would be taken to any hospital or medical institution or any other place for a blood test of any kind?

A. I was not notified.

Q. To your knowledge was anybody in your office so notified?

A. They were not.

Q. Do you have any records that you have maintained in the course of this case? Do you have a file in your office that you keep?

A. Yes, I do.

Q. Do you in that file have any kind of a notice or any indication that a blood test was going to be made of a defendant?

A. There is no notice whatsoever that the defendant would be removed from the St. Louis Couny Jail, or from the Juvenile Home. I believe he was at the [672] Juvenile Home at the time.

Mr. Howlett: Your Witness.

Mr. Settich: Thank you, Mr. Shaw; I have no questions.

The Court: You may step down, sir.

Mr. Shaw: No, if Your Honor please. May I have the file? May we have just a second, Your Honor?

The Court: Yes, sir.

Mr. Howlett: Would you mark that as a defendant's exhibit?

(Whereupon, Defendant's Exhibit E was marked for identification as requested.)

Mr. Howlett: I will recall the witness to the stand, Your Honor, please.

The Court: Mr. Shaw, you are still under oath.

The Witness: Yes, sir.

Q. (By Mr. Howlett) I hand you what has been marked Defendant's Exhibit E, Mr. Shaw; ask you if you can identify that, please, sir?

A. Defendant's Exhibit E is a copy of a Juvenile Court Order issued by Judge Noah Weinstein certifying the juvenile, Daniel Stevens, to the Circuit Court. It is an order where he is certified so that he may be tried as an adult. Together with this order is a court memorandum, a copy of a court memorandum, a photostat of such, signed by Judge Weinstein and [673] signed by myself and Mr. William Copeland, who was also a lawyer for Daniel Stevens.

Q. Did you receive that exhibit in the ordinary course of your business, sir?

A. I was present at the time the order was entered; I received the memorandum at the very time that the memorandum was signed and filed. And I received the Court Order, actually, through the mail about two days later.

Q. And who else was present at the time that order was entered, sir?

A. The Juvenile Court officials, some Ballwin Police Officers, and I believe a representative of the Prosecuting Attorney's Office.

Q. All right; what was the date that this took place?

A. That was April 28, 1969—'68.

Q. '68 or '69?

A. I am sorry; April 28, 1969.

Q. Now, had you had contact with the Prosecuting Attorney's Office before July 2, 1969, with respect to this case?

A. I had.

Q. Had you made any other appearances in any other court with respect to this case at which the juvenile, or the Prosecuting Attorney's Office was represented?

A. Well, I had discussed the matter of bail with several members of the Prosecuting Attorney's Office.

[674] Q. Did you appear on a search warrant in Judge Lewis' Court?

A. I did.

Q. Was anybody from the Prosecuting Attorney's Office there?

A. There was.

Q. Did you give anybody permission to take Danny Stevens from the County Jail to the County Hospital and have this test performed?

A. I did not.

Q. Did you receive any of the results of this test?

A. I did not.

Mr. Howlett: Your witness.

Mr. Settich: Judge, I have no objection to the exhibit inasmuch as it is a copy of the Court Order; I have no objection to that. Nor do I have any objection to the photostatic copy of the order that was agreed to in April 28, 1968. Other than those two facts, I have no objection to that.

I have no questions of this witness.

Mr. Howlett: At this time, Your Honor, I will ask this be introduced in evidence. Do we have to wait until the Defendant's case?

Mr. Shaw: Well, for the purposes of this hearing we will introduce it now.

The Court: It will be received.

(Witness excused.)

Mr. Shaw: Your Honor, I believe that the case of Massai probably ought to be looked at at this time.

[675] The Court: Do you have the citation?

Mr. Shaw: I might have it with me.

The Court: Do you have some memorandum you want to present to me, or evidence?

Mr. Settich: I have no evidence that I want to put on. I just want to call the Court's attention to one controlling case in this matter, which is Smurber versus State of California, which is a 1966 case; and in effect it held——

The Court: What is it styled?

Mr. Settich: Style of the case is 384 U.S. 757, Judge.

The Court: 384 U.S.——

Mr. Settich: Yes, 757. And in conjunction, Blydenburg versus David, 413 SE 2nd 284, might basically tell the Court in the Smurber versus California case, that case was likewise a blood test case, and it said that the United States Constitution did not protect an individual from giving blood; if blood was to be taken from them they had to submit to the tests so their blood could be given. And the Court went on to even discuss the point where counsel, if there was counsel—if counsel was not notified, would make little or no difference. And the Court said that since the self-incriminating privilege is not applicable it cannot be said that defendant had a right to counsel, because you do not have a right to counsel to [676] protect some particular right that you don't have. That is, you don't have a right to say, "I am not going

to give blood." The giving of blood is not giving of evidence against yourself, and so the other cases—so whether or not you had counsel, didn't have counsel, or if you had counsel, they weren't notified, is not important at all.

The Court: I understand that to be your position, Mr. Settich.

Now, what about yours?

Mr. Shaw: Well, Your Honor, it is not whether or not this—whether they can take blood; I think that has been established. They can take blood. But when there is a lawyer in the case, they do not notify the lawyer. He is taken out of the jail; he is still at this particular time in Juvenile Detention; nobody is notified. He is taken out. This falls within the purvue of the Massai case.

Now, if we could have just a few minutes to get that for you, we will go right down the hall here. In that particular instance somebody was taken out and questioned.

The Court: Do you have the style? The bailiff could go get it.

The Bailiff: The library isn't open.

The Court: The library is closed.

Mr. Settich: They can use our library; we have no objection to that. We have the United States Record.

[677] The Court: Fifteen minutes?

Mr. Shaw: I think so.

The Court: Court will be in recess for fifteen minutes.

(Whereupon there was a fifteen minute recess, after which the following occurred, with the jury still in their deliberation room.)

The Court: The Court has decided that Mr. Shaw's motion at this time is to be overruled. I feel that the Smurber case, Smurber versus State of Missouri, decided by the United States Supreme Court, is compelling to this case.

In its argument the Supreme Court held that the pro-

hibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence whenever it may be material. The objection in principal would forbid a jury to look at a prisoner and compare his features with a photograph in proof if this were not the law.

The Court also feels that inasmuch as the Court has concluded that this is not a right, that is the withdrawing of his blood, is not a right protected under the Fifth Amendment of the United States Constitution; then the man, or the defendant, does not have a right to have his counsel present, there being no right under the Fifth Amendment involved. And [678] for those reasons your motion is overruled.

Mr. Shaw: Your Honor, I will ask that the jury be discharged and a mistrial declared.

The Court: Very well, sir, and that motion is overruled.

Mr. Settich: If Your Honor please, may we approach the bench?

(Whereupon counsel and reporter approached the bench, where the following occurred.)

Mr. Settich: Judge, there was only one thing I noticed; when you started to put the holdings of the Court, you said Verber versus State of Missouri.

The Court: All right; I will correct the record.

Mr. Settich: It should be Smurber versus State of California.

(Whereupon counsel returned to their places and the following occurred in open court, still with jury not present.)

The Court: For the record, it's been called to my attention that I may have inadvertently referred to the case as Verber versus State of Missouri, and it was my intention,

and the fact is, that the case is Smurber versus State of California, which is styled 384 U.S. 763.

All right; you may proceed, sir. We will bring the [679] jury down first.

(Whereupon the jury was returned to the box and the following occurred in their presence.)

VARKEY PHILLIP, having been again sworn, testified as follows:

By Mr. Settich

Q. Mr. Phillips, I don't know, I wasn't able to observe——

Mr. Settich: Was he sworn again?

The Court: Yes.

Q. (By Mr. Settich) You understand you are under oath; is that correct?

A. Yes, I do.

Mr. Settich: Will you mark this State's Exhibit 58?

(Whereupon State's Exhibit 58 was marked for identification as requested.)

Mr. Shaw: Your Honor, I'd like to ask one more question. I don't think we need to; this is in a manner of qualifying the witness. I would like to ask whether or not he is a Christian. I ask that for one reason; if he is an East Indian it may be that the oath that we administer does not properly put him under oath, and that would nullify our entire trial.

The Court: We won't limit it to a Christian.

Mr. Shaw: Well, it may be that religion that [680] doesn't recognize this oath.

The Court: Very well, sir; do you wish to inquire?

The Witness: Yes, sir; I am a Christian.

Mr. Shaw: That answers the question. In other words, this oath is the same——

The Witness: Yes; yes.

Q. (By Mr. Settich) Doctor, I will show you what has been marked as State's Exhibit 58; would you take a look at that, please?

A. Yes.

Q. Now what is State's Exhibit 58?

A. It is a requisition for typing some blood.

Q. I can't hear you, sir.

A. It is a requisition to type blood.

Q. A requisition to type blood?

A. Right.

Q. Now did you fill out any part of that requisition, sir?

A. Yes.

Q. What part did you fill out?

A. I filled out the name and address, age, and my signature, and what I wanted.

Q. Now does that all appear on State's Exhibit 58?

A. Yes, it all does.

Q. And is that your handwriting?

A. Yes, that is my handwriting.

Mr. Settich: If your Honor please, at this [681] time State would ask leave to introduce into evidence State's Exhibit 58.

Mr. Shaw: Same objection as previously noted.

The Court: Very well, sir; and it is overruled.

It will be so received.

* * * * * * *

[236] **APPENDIX E**

(Testimony Relative to Second Question Presented)

The Court: Mr. Shaw, do you wish to make some announcement, sir?

Mr. Shaw: Well, I had previously requested an interlocutory hearing relative to the admissibility of any statements taken from the defendant while he was at the juvenile home and in the presence of Sgt. Gockle, who was the witness about to testify.

Mr. Settich: Well, so Mr. Shaw might know, Capt. Valenti is outside the courtroom and he is the one that conducted the questioning.

The Court: Very well, sir; your request is granted.

You may proceed.

Mr. Settich: Would you call Capt. Valenti?

NICHOLAS VALENTI,

having been duly sworn, testified out of hearing of the jury, as follows:

Direct Examination

By Mr. Shaw

Q. Will you state your name, please?

[237] A. Nicholas Valenti.

Q. What is your trade, occupation, business or profession?

A. I am a police officer with the St. Louis Metropolitan Police Department.

Q. Are you assigned to any special squad or, in particular, special homicide squad?

A. Yes, sir; I am head of the Major Case Squad.

Q. Now, is there an organization known——

The Court: Just a moment, Mr. Shaw.

(Whereupon adjustment was made to cut down outside noise.)

Q. (By Mr. Shaw) Did you have an occasion as the head of the Major Case Squad in November of 1968 to be called in to a matter involving the slaying, the death, of a Mrs. Abbott, who lived in Ballwin in St. Louis County, Missouri?

A. Yes, sir.

Q. Did you have an occasion at any time after being called into that case to speak with and to interrogate the juvenile who was held at the juvenile center in November of 1969 by the name of Daniel Stevens?

Mr. Settich: Just a moment.

A. 19——

Mr. Settich: Just a moment; 1969?

Q. (By Mr. Shaw) I am sorry; '68.

A. Yes, sir, I did.

[238] Q. Could you tell us the date that you first spoke with the defendant?

A. Yes, sir; November 26, 1968.

Q. And where was this that you spoke with him?

A. The St. Louis County Juvenile Building.

Q. Now could you tell us who was present when you spoke with him?

A. Yes, sir. Mr. and Mrs. Stevens, Mr. Heitman, the Assistant Prosecuting Attorney, Chief Loehr, of Ballwin Police Department.

Q. Now Mr. and Mrs. Stevens, I take it were identified as the mother and father of the juvenile; is that right?

A. That is correct.

Q. And who was Mr. Heitman?

A. St. Louis Prosecuting Attorney—St. Louis County, rather.

Q. And there was a Chief Loehr; is that right?

A. That is correct.

Q. Donald Loehr; Chief of Police of Ballwin?

A. Yes, sir.

Q. And who else?

A. And also Sgt. Gockel, if I am pronouncing it right.

Q. Gockel; does that sound right?

A. Right.

Q. Was there any other person there?

A. No, sir.

Q. There were no personnel from the juvenile home [239] in attendance?

A. Not that I can recall.

Q. And you were aware, of course, that the defendant at that time was a juvenile of the age of fourteen?

A. Very much so.

Q. And about what did you speak to him?

A. About the case in Ballwin, Missouri.

Q. What was the first thing that you said to the fourteen year old?

A. The first thing that I told Danny was that I was going to advise him of his rights, and I was going to continue on with my interrogation, and his——

Q. All right. Now just a second. You say that you told him that you were going to advise him of your rights?

A. Yes.

Q. Of his rights?

A. Right.

Q. And that you were going to continue on with the investigation?

A. With the questioning; with the questioning in the case of Mrs. Abbott.

Q. Now let me—the first thing you said was what? Tell us how you said it.

A. I says, "Danny, I am going to advise you of your constitutional rights", and I went ahead with it; that certainly I was going to interrogate him in the presence of both his mother and father, the Deputy Prosecuting Attorney, Chief Loehr, and also Sgt. Gockel.

[240] Q. Well, just a second, Captain. Now, as I understand it, you told him you would advise him of his rights?

A. I did.

Q. All right. What did you tell him?

A. I told him that certainly he didn't have to make a statement; that anything that he said could be used against him in court; that he was entitled to a lawyer; and if he or his family couldn't afford a lawyer, that certainly that the court would appoint one.

Q. You said that anything that he might tell you could be used against him?

A. Would be used.

Q. Did you say could or would be used?

A. Would be used.

Q. Would be used?

A. Would be used.

Q. Then did you tell him that you were going to go ahead and question him anyway?

A. Well, after he told me that he understood, in fact, at that time I asked him how much education did he have.

Q. How much did he have?

A. Ninth grade.

Q. Ninth grade. Did he tell you that he understood?

A. Yes, sir, he did.

Q. Well, did you put him through any tests or anything to ask him if he understood this?

A. Well, the test, I asked him to give me his full name, pedigree.

[241] Q. Pedigree?

A. Name, age, what school he went to, the Crestview School, and how old, when he was born. And I think this was about the extent of it. And how was his grades in school, and——

Q. What did he tell you about that?

A. That he was a pretty fair student.

Q. So you felt that, being fourteen and a fair student, he would understand these legal matters that you advised him of; is that right?

A. As I went along for my conversations, his answers, and from my experience, I felt that he understood what I was talking about.

Q. Well, did you ask him—strike that. You told him he could have a lawyer?

A. Yes, sir.

Q. And what did he say?

A. Indicated; he didn't say.

Q. He didn't say?

A. He didn't say.

Q. Well now, let me get this: You said to him what about a lawyer?

A. I said that he was entitled to a lawyer.

Q. And what did he say when you said to him, "You are entitled to a lawyer."?

A. He says that he understood; both he and his family, his mother and father.

Q. Well now, I thought that you said that he didn't say anything.

A. Well, certainly **[242]** after I was through advising him, he says that he understood——

Q. Well, but after saying that he understood——

A. ——and that his mother and father said that it was all right.

Q. No, we are talking about him. Did the boy say to you he did not want a lawyer?

A. No, sir.

Q. Did he say that he wanted to talk to you and tell you something?

A. Now from the conversation, certainly he wanted to talk to me.

Q. Now wait just a second; I just asked you a question, Captain. I asked you this; did the boy say that he wanted to speak to you?

A. I don't know. I don't recall verbatim, but from the conversation, yes, he wanted to talk to me.

Q. What was his conversation? What did he tell you?

A. Answered my questions. And I asked him if he understood what I was saying, and he says, "Yes, sir." "Then of course you want to answer my questions?" and he says, "Yes, sir."

Q. Oh, he said, "Yes, sir; I want to answer your questions."

A. Right.

Q. But now when we get to the lawyer part of it he didn't answer, did he?

A. Well, I completed my—me advising him of his rights; and after that was completed he says, "Yes, sir, I understand," **[243]** and we continued from there. I says, "then I will go ahead and ask you some questions." "Yes, sir." And there again Mr. and Mrs. Stevens says that it was all right.

Q. Well, of course, did you ask Mr. and Mrs. Stevens whether they had ever been in a police station before, or in a juvenile home, or in any way involved with police?

A. I don't recall if I did.

Q. Well, of course, you checked on them, didn't you?

Mr. Settich: Just a moment, if your Honor please. I will object to that as being immaterial and irrelevant.

The Court: Sustained.

Q. (By Mr. Shaw) If you don't remember whether you asked them, do you know whether anyone while you were there asked them if they understood their son's constitutional rights?

A. Pardon me? I didn't quite understand.

Q. Well, did you ask Mr. and Mrs. Stevens whether or not they understood what their son's constitutional rights were?

A. I also advised them of their rights, and they also understood. And they spoke to me prior to me talking to Danny.

Q. All right. Did you advise them that Daniel did not have to speak with you?

A. I didn't tell them directly, but when I was telling Danny this they were present; and I asked them, after completing talking to Danny and advising him, whether it was all right. They understood; they says that it was all right.

[244] Q. And this was all done in the juvenile home; is that right?

A. That is correct; right.

Q. And this was what time of day?

A. It was in the evening, about 8:00 o'clock or whereabouts.

Q. Do you know how you—strike that. Do you know who gave you permission to go to the juvenile home and talk with Danny?

A. Who gave me permission?

Q. Yes, sir.

A. Well, not being too familiar with that area, Chief Loehr said that this is where the boy was, at juvenile court, and he would direct me to this particular place. And, of course, he and I went to juvenile court.

Q. Then you don't know how you got into the juvenile home, how it was that you were allowed to interrogate him in the juvenile home; is that right?

A. Well, this is common.

Q. No; now just a second.

A. This is common.

Q. Is it common in Judge Weinstein's Juvenile Court?

A. Well, I can tell you what is common in St. Louis Court, that in juvenile.

Q. We are not in St. Louis, sir. We know very well what happens in St. Louis, and not all proper.

Mr. Settich: Just a moment.

[245] If Your Honor please, I will object to that last statement of counsel and ask that it be stricken.

The Court: All right, sir; your objection is sustained and it will be stricken. City of St. Louis is not on trial here.

Mr. Shaw: No, nor is City of St. Louis a paragon of proper procedure.

Mr. Settich: Well, if Your Honor please, I will ask that the last statement of counsel be stricken; it is all unnecessary.

Mr. Shaw: Well, then I will ask also, Your Honor, that the witness not refer to what he does in St. Louis.

The Court: All right, Mr. Shaw; if you will kindly proceed. I don't think there's been any harm done anywhere by any of the statements so far.

Q. (By Mr. Shaw) Now, Officer, while in the juvenile home and while you questioned him, and you explained to him that anything that he said would be used against him?

A. Yes, sir.

Q. Now what did he say in answer to that? anything?

A. On completion, said it was all right to question him.

Q. Well, as I understand it then, you put all of this together, is that right, what you call his rights? You put all of this together and read it off to him?

A. No, sir, I did not read it off to him.

[246] Q. You told him about it?

A. That's right.

Q. And at the end of that you then proceeded to question him?

A. After he told me that he understood; and then I proceeded to question him; yes, sir.

Mr. Shaw: I have no further questions.

Mr. Settich: I have no questions.

The Court: You may step down, sir.

Mr. Settich: Take a seat outside, please, Officer.

(Witness temporarily excused.)

Mr. Shaw: Now, if Your Honor please, I am going to move that any testimony relative to what was said to this officer or any other officers in the juvenile home, when the defendant was under the protection of the juvenile code, when he was being treated as a juvenile, when he was taken to the juvenile home where he would be protected by our law from this investigation and from the interrogation that he was subjected to; I am going to ask

that it be suppressed and not admitted into evidence. And object to it as a violation of the Missouri Juvenile Code, as interpreted in the case of State of Missouri versus the Arbiter lad, which is reported in 408 Southwest 2nd, and particularly here, page 26. And also in the United States Supreme Court interpretation of a juvenile code in the matter known as the application of Gault, the Arbiter case. That is my formal argument.

[247] The Court: Very well, sir.

Mr. Settich: If Your Honor please, the Gault case that Mr. Shaw mentions, I am not familiar with that particular holding in the Gault case; that it indicates that if the defendant, even though he may be a juvenile, is questioned by someone other than the juvenile authority, that that in itself is a violation of a juvenile's rights. Nor am I familiar—I don't believe the Arbiter case to hold that way either. One of the main holdings in the Arbiter case had to deal with production of records. And if Mr. Shaw's interpretation of the Arbiter case is such as he has presented to the Court, I do not see that interpretation in the Arbiter case.

Now I know just recently there was a statute that was passed in the last session that deals with juveniles, but that particular statute would have no application in this case, and it deals with the questioning of juveniles by juvenile officers. I have nothing else to say in the matter; I would rest on the Arbiter case as it is; and I do not believe it is applicable in this particular set of facts.

Mr. Shaw: Your Honor, first of all, the Gault. He mentioned the Gault case; what is the application of Gault. As decided by the Supreme Court of the United States, laid down the broad general rule that the juvenile proceeding was, by statute and by common acceptance, an informal proceeding in [248] which they tried to keep the family atmosphere as much as possible during the proceeding. The Gault decision says that this can trap the ju-

venile; that here the juvenile, who is offered the protection of the juvenile home, because he does feel that he is among friends, and because he is in a protective atmosphere, will then go ahead and make statements and talk and co-operate with juvenile people, juvenile police, juvenile home agents, juvenile home workers; then after he does this, to use these against him in a subsequent proceeding is giving the juvenile the worst of both the adult life and the juvenile life.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-173

DANIEL STEVENS,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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OPINIONS BELOW

The opinion of the Supreme Court of Missouri affirming the conviction and sentence of petitioner is reported as *State* v. *Stevens*, 467 S.W.2d 10 (Mo. 1971). The order of the Supreme Court of Missouri denying petitioner's motion for rehearing or transfer to the court en banc is reported, without memorandum, along with the above opinion.

JURISDICTION

Respondent hereby accepts petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether, under the Sixth Amendment of the Constitution of the United States, the withdrawal and analysis of a blood sample is a critical stage of a criminal proceeding, therefore requiring the presence and representation by counsel at the time such blood is withdrawn.

2. Whether, the procedure of informing petitioner of his Miranda rights, affirmatively determining that petitioner has understood the explanation of those rights, and observing that petitioner wanted to answer questions without the presence of counsel is sufficient to show a waiver of petitioner's right to counsel and his right to remain silent.

STATEMENT

On July 31, 1969, an indictment was filed in the Circuit Court of St. Louis County, Missouri charging petitioner with first degree murder in connection with the death of Mrs. Elizabeth Abbott. Thereafter, on August 8, 1969, petitioner was arraigned and entered a plea of not guilty. From October 27, 1969 thru November 6, 1969, a trial was held in Division No. 4 of the Circuit Court of St. Louis County, Missouri, the Honorable Herbert Lasky, Judge, presiding. The trial court instructed the jury on murder in the first degree and in the second degree. The jury returned a verdict of guilty of murder in the second degree and entered a finding that it was unable to assess punishment. On December 17, 1969, the trial court pronounced judgment and sentenced petitioner to a term of life imprisonment. From that judgment and sentence, petitioner

appealed to the Supreme Court of Missouri. In April 1971, the Supreme Court of Missouri affirmed the judgment and sentence of the trial court and thereafter, on May 10, 1971, denied petitioner's motion for rehearing or transfer to court en banc. *State* v. *Stevens*, 467 S.W.2d 10 (Mo. 1971). The salient facts underlying petitioner's conviction are stated as follows:

On November 25, 1968 at approximately 1:30 p.m., Gary Kehoe, nephew of the deceased, found the body of Elizabeth Abbott at her residence at 233 Dennison, Ballwin, Missouri. Mrs. Abbott had been repeatedly beaten over the head with a six pound barbell and had died sometime after ten o'clock and before noon on that day.

In response to Kehoe's call, members of the St. Louis County and Ballwin Police Department came to the scene of the crime. The barbell was found lying next to the body of the deceased. An investigation revealed the presence of a fabric mark or glove mark impressions on the barbell, but no fingerprints were found.

Petitioner, who was 14 years old on November 25, 1968, was a next door neighbor of the deceased. On the day of the crime, petitioner had stayed home from school to care for his younger brother. Richard Abbott, son of the deceased, had a brief conversation with petitioner in the deceased's house at approximately 8:00 a.m. on November 25, 1968.

On November 26, 1968, Officer Gockel and Chief Loehr of the Ballwin Police Department found a yellow shirt and a pair of gloves in a multiflora rose bush near the petitioner's residence. A chemical analysis of the stains found on the yellow shirt and right hand glove showed the presence of human blood Type O. The deceased's blood was Type O, positive, the petitioner's Type A, positive. Hairs found on the yellow shirt, the right hand glove, in

the hallway of the deceased's house, and from the deceased's hair roller were analyzed in a nuclear activation analysis experiment and all were found to be from the same person, i.e. the deceased. Petitioner admitted that he had had a similar shirt and pair of gloves, but claimed that he had thrown the yellow shirt away on the morning of the murder and that he had lost the gloves several days before. A blue shirt found in petitioner's bedroom proved to be identical in several respects to the yellow shirt—both were short sleeved, the same size, and the same brand name.

On November 26, 1968, at approximately 2:00 p.m. Officers Zimmerly and Binggeli talked with petitioner in the principal's office at Crestview High School. Officer Binggeli noticed a spot on the insole of petitioner's right shoe and took a scraping of the spot. At that time Officer Binggeli also scraped some material from beneath petitioner's fingernails. The chemical analysis of the shoe scraping showed the presence of human blood, but the blood could not be typed due to the insufficiency of the sample. A chemical analysis of the fingernail scrapings showed the presence of blood, but it could not be determined whether the blood was human blood due to the insufficiency of the sample.

At approximately 5:00 p.m., November 26, 1968, Officer Gockel and Chief Loehr of the Ballwin Police Department went to Crestview High School and placed petitioner under arrest. The officers immediately delivered petitioner to the St. Louis County Juvenile Detention Center. Thereafter, petitioner was remanded to the adult court for trial.

In March 1969, petitioner admitted to Ralph Turnbough and Thomas Mound, fellow detainees with petitioner in the St. Louis County Juvenile Detention Center, that he had beat the deceased in the head with a barbell.

ARGUMENT

I.

The withdrawal and analysis of a blood sample is not a critical stage of the criminal proceedings at which representation by counsel is required, and therefore the extraction of blood from petitioner was not a denial of his rights under the Sixth Amendment to the Constitution of the United States.

Petitioner's first contention asserts that the extraction of a sample of petitioner's blood for group and type analyzation was violative of his rights under the Sixth Amendment of the Constitution of the United States. Respondent believes this contention to be completely unsupported by the case law of this court which interprets and applies the Sixth Amendment.

Before trial petitioner was taken from the Juvenile Detention Center to St. Louis County Hospital where, at the request of the Police, a blood sample was withdrawn and chemically analyzed for blood group and type. Petitioner's retained counsel was not notified and was not present when the blood sample was extracted and analyzed.

At trial Dr. Varkey Phillip, a physician attached to St. Louis County Hospital, testified that he withdrew the blood sample from petitioner. The doctor, however, did not personally analyze the sample but forwarded it along with a requisition form for blood grouping analysis to the hospital's laboratory. The results of the analysis (blood type A positive) were recorded on the requisition form which was introduced into evidence as State's Exhibit No. 58.

Petitioner maintains that he was denied the right to the assistance of counsel in that his retained counsel was not notified and was not present when the blood sample was voluntarily given by petitioner. The United States Supreme Court has held that the presence of counsel is required at each critical stage of the criminal proceedings against an accused. *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Hamilton* v. *Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); *White* v. *Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); *Miranda* v. *Arizona*, 382 U.S. 925, 86 S.Ct. 320, 15 L.Ed.2d 338 (1965); *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). This court has defined a critical stage as one where the defendant's rights may be prejudiced and the presence of counsel may help avoid that prejudice, or when the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right to meaningfully cross-examine the witnesses against him and to have the effective assistance at the trial itself. *United States* v. *Wade*, 388 U.S. at 227. It is respondent's contention that a blood sample analysis involves neither of these considerations and is therefore not a critical stage requiring the presence of counsel. *Schmerber* v. *California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *United States* v. *Wade*, *supra*.

In *Schmerber* v. *California*, *supra*, a blood sample was withdrawn from the defendant for alcoholic analysis despite his refusal, based upon the advice of counsel, to consent to the test. The defendant alleged that the withdrawal of the blood sample and the admission of the analysis in evidence against him at trial violated the privilege against self-incrimination and the right to the assistance of counsel.

Drawing upon the well established principle that the privilege against self-incrimination is a bar against compelling testimony or communications, but not a bar against compulsion which makes the accused the source of real physical evidence, this court found that the blood sample was real or physical evidence and that compelling the defendant to submit to the blood analysis test did not violate his privilege against self-incrimination. As the defendant had no right to protect, the court held that he was not denied the right to the assistance of counsel:

> "Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. . . . No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. . . ." *Schmerber* v. *California*, 384 U.S. at 765.

Thereafter, in *United States* v. *Wade*, 388 U.S. at 227-228, this court stated:

> "We think there are differences which preclude such stages [systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like] being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial."

Respondent believes that the above language from *United States* v. *Wade* is significant and controlling in the case at bar. This language stands for the proposition that the extraction and analysis of a blood sample is not a critical stage requiring the presence of counsel since a defendant's rights are not prejudiced by appearing at such stage without the assistance of counsel. A defendant's participation at such a stage is in fact irrelevant, except as a donor, because the results of the test depend upon the chemical analysis alone.

While *Schmerber* v. *California, supra,* concerned the extraction of a blood sample for alcoholic analysis, the blood sample was extracted in this case for group and type analysis. The difference in the reasons for the extraction of a blood sample, however, is irrelevant because the blood sample itself is real or physical evidence no matter what the purposes of analysis may be. *Wilson* v. *State,* 225 So.2d 321 (Fla. 1969); *Brent* v. *White,* 398 F.2d 503 (5th Cir. 1968), Cert. Den. 393 U.S. 1123, 89 S.Ct. 998, 22 L.Ed.2d 130 (1969); *Commonwealth* v. *Gordon,* 246 A.2d 325 (Pa. 1968), Cert. Den. 394 U.S. 937, 89 S.Ct. 1215, 22 L.Ed.2d 469 (1969); *State* v. *Cary,* 230 A.2d 384 (N.J. 1967); *Davis* v. *State,* 57 A.2d 289 (Md. 1948).

Petitioner has relied on *Graves* v. *Beto,* 424 F.2d 524 (5th Cir. 1970), in claiming that "a search of the body by means of extracting blood for the purposes of typing have been held to come within the safeguards of the Fourth Amendment". (Petition page 8). Respondent believes that petitioner's reliance upon the Fourth Amendment as a basis for writ of certiorari is ill founded. It should be noted that the issue of an illegal search i.e., that a search warrant should have been obtained prior to the extraction, was never argued in the trial court nor in petitioner's appeal to the Supreme Court of Missouri. Respondent believes that a proper predicate for the issue of an illegal

search has not been laid and that the trial court and the Missouri Supreme Court were never given an opportunity to rule on this contention. Thus, respondent believes that the petitioner has failed to comply with Rule 19.1(a), Revised Rules of the Supreme Court of United States. Respondent also believes that the blood sample given by petitioner was freely and voluntarily given and that the record supports this assertion (Page A-33, Petition).

Respondent fails to see what rights could have been protected if petitioner's counsel had been notified and advised that petitioner was going to be asked for a sample of his blood. Certainly, the petitioner did not acquire any greater rights than did the defendant in *Schmerber* v. *California, supra,* simply because his retained counsel did not know that the blood sample was to be withdrawn. The facts remain that petitioner's rights were not prejudiced by submitting to the test in the absence of counsel and, thus, there is no issue as to the ability of counsel to help avoid any prejudice to the petitioner's rights or to meaningfully assist petitioner at trial.

Petitioner's reliance upon *Massiah* v. *United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), is unjustified. In that case, the defendant, after being indicted with other persons for violating federal narcotics laws, retained an attorney, pled not guilty, and was released on bail. While free on bail, the defendant had a conversation in the absence of his retained counsel with one of his co-defendants, unaware that the co-defendant had turned informer and that the meeting was prearranged by federal agents who, while out of sight, overheard defendant making incriminating statements. In reversing defendant's conviction, this court characterized the prearranged meeting as deliberate but surreptitious interrogation and noted that such an interrogation was as critical a stage as an interro-

gation conducted in the jail house. The conclusion that *Massiah* was denied the right to the assistance of counsel rested upon the court's conclusion that:

> "Anything less . . . might deny a defendant effective representation by counsel at the only stage where legal aid and advice would help him." *Massiah* v. *United States*, 377 U.S. at 204.

The distinction between *Massiah* v. *United States*, and *Schmerber* v. *California* is readily apparent. The incriminating evidence deliberately elicited in *Massiah* was clearly testimonial, and counsel could have helped to safeguard the defendant's privilege against self-incrimination from being jeopardized during the interrogation. On the other hand, the evidence obtained from petitioner (and from the defendant in Schmerber) was non-testimonial, and thus, there is no issue as to the ability of counsel to help avoid any prejudice to the petitioner's rights. The difference between the holdings in *Schmerber* and *Massiah* simply highlights the difference between the nature of an interrogation and a blood analysis test, indicating why the former is a critical stage requiring the presence of counsel and the latter is not a critical stage. In an interrogation, whether custodial or surreptitious, incriminating evidence is obtained directly by the defendant's responses and reactions to the conduct of the police, while in a blood analysis test, incriminating evidence is obtained through chemical analysis, the conduct of the police and the participation of the defendant, except as donor, being irrelevant.

Petitioner also claims that, "With the due notice, petitioner's counsel might well have hired his own experts to perform the same examinations and tests as those performed by the prosecuting authorities." (Petition page 9). Respondent considers this argument to be frivolous. First, counsel could have deposed the doctor who withdrew pe-

titioner's blood sample and the medical technician who analyzed the sample as their names and addresses were indorsed on the indictment. *State* v. *Aubuchon,* 381 S.W.2d 807 (1964); Missouri Supreme Court Rule 25.10, V.A.M.R. Counsel also could have made a motion to produce under Supreme Court Rule 25.19, V.A.M.R. Also, as suggested in *United States* v. *Wade,* 388 U.S. at 227, counsel could have had a separate analysis made for his own use, to use as a comparison to check the accuracy of the State's blood sample analysis. Counsel also had the opportunity to check the accuracy of the State's blood sample analysis by cross-examining the State's expert at trial on the basis of readily available scientific information. There is no issue as to the State's suppression of evidence favorable to the petitioner. The important point is not that counsel for petitioner could have discovered the results of the blood analysis test and checked it for accuracy, but that the lower courts should not be judged guilty of an error where counsel failed to take readily available steps to discover the information so desired.

It is thus respondent's position that petitioner was clearly not denied his right to have the assistance of counsel in compliance with the Sixth Amendment to the Constitution of the United States. It is also clear that the issue of petitioner's denial of his Fourth Amendment right to be secure from an unreasonable search is not a proper issue upon which to base a petition for writ of certiorari to this court. Appellant has never raised the issue of an illegal search in any state proceeding and as such, has not met the requirements of Rule 19.1 (a), Revised Rules of the Supreme Court of the United States.

II.

Testimony by a police officer of statements made by petitioner during custodial interrogation was properly admitted as evidence.

As a second basis for arguing that a writ of certiorari should issue, petitioner contends that testimony of statements made by petitioner during a custodial interrogation was introduced without any showing that petitioner or his parents made a knowing and intelligent waiver of petitioner's right to remain silent, and petitioner's right to counsel during interrogation. Respondent believes that during the progress of the case through the courts of Missouri the question of a waiver of petitioner's right to counsel has been confused with the question of petitioner's waiver of his right to remain silent. The record of the trial shows that petitioner's attorney requested an interlocutory hearing on the question of the admissibility of statements taken from the petitioner when it became apparent that testimony of those statements was about to be offered (Tr. 236). At the trial, however, petitioner's attorney argued that evidence admitted during this interlocutory hearing showed no waiver by petitioner of his right to remain silent (Tr. 247-249). Likewise in his motion for new trial petitioner did not specify as error the introduction of petitioner's statements without showing a waiver by petitioner of his right to counsel at the time the statement was taken. Instead, petitioner's motion for new trial alleged that petitioner was not apprised of his basic constitutional rights, guarantees, and privileges prior to the interrogation, and that for several reasons petitioner could not be held to have validly waived these rights, guarantees and privileges (Tr. 1197-1198). On appeal, however, petitioner's contention shifted from an allegation of no waiver of petitioner's right to remain silent to an allegation that no waiver had been

shown of petitioner's right to counsel, during the interrogation (Appellant's Brief to the Supreme Court of Missouri pages 26-29). The Missouri Supreme Court recognized this shift in its opinion and determined that the question of whether petitioner waived his right to the presence of counsel during interrogation was being raised for the first time on appeal (467 S.W.2d 18-19). In his petition to the Supreme Court of the United States seeking a writ of certiorari, petitioner is raising both issues. Petitioner contends that his rights under the Miranda decision were violated because his past statements were introduced without a showing that he had waived his right to remain silent and without a showing that he had waived his right to the presence of counsel during the interrogation.

While petitioner asserts that the record must show that there was no waiver by petitioner of these two rights, respondent believes there was a volume of evidence which would indicate that the trial court properly admitted the statements to evidence and that the Supreme Court of Missouri was correct in affirming that decision. There was evidence that petitioner was advised of his "Miranda rights" upon arrest and that petitioner stated that he fully understood those rights (Tr. 231-233); that an officer further admonished petitioner not to make any statements to the police (Tr. 233); that after petitioner arrived at the Juvenile Detention Center he was again informed of his "Miranda rights" before the beginning of the interrogation and that petitioner stated that he understood those rights (Tr. 239-240); that before the interrogation commenced the interrogating officer informed the petitioner that he wanted to ask him questions concerning the death of Mrs. Abbott and that he then conducted a brief investigation of petitioner's educational background in order to determine his capacity to understand (Tr. 239-241); that petitioner stated that he wanted to answer the interrogat-

ing officer's questions (Tr. 242, 245); that petitioner's parents were present during the questioning and that petitioner's father urged or advised petitioner to tell the police his story (Tr. 254). In addition there was no evidence that the statements were procured by coercion or threats, either physical or mental, or by promises of leniency or reward. Upon this evidence the trial court found that petitioner's statements were voluntarily made and petitioner's motion to suppress was denied (Tr. 266-267).

On appeal the Supreme Court of Missouri affirmed petitioner's conviction and found against petitioner on his argument that there was no showing that petitioner had waived his right to counsel during interrogation. The court stated that first of all, the statements when offered in evidence at trial were not objected to for this reason, and that the trial court could not be held to have committed error in failing to refuse testimony for a reason not presented to it. The court stated that this is a procedural rule which prevents an accused from trapping the trial court by presenting to it an unmeritorious reason in support of an objection and then presenting an entirely different reason to the appellate court (467 S.W.2d 18). Respondent believes, therefore, that the Supreme Court of Missouri decided this issue against petitioner on an independent and adequate state ground, and that therefore the federal question is not determinative and the judgment should not be reviewed by this court. Respondent further contends that this procedural rule serves a legitimate state interest which a state may enforce through its rule of evidence. *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

The Supreme Court of Missouri decided against petitioner on the issue of whether petitioner's right to pres-

ence of counsel was waived for another reason also. In its opinion the court states:

> "Our second reason is that the evidence at the interlocutory hearing clearly shows that appellant was offered counsel but intelligently and understandingly rejected the offer, and that a 'silent record' is not relied on as a basis of presuming waiver of counsel at the interrogation. . . ." (467 S.W.2d 18).

Therefore, the Missouri Supreme Court found that this offer and rejection was a waiver. It then concluded that the evidence supported the trial court's conclusion that petitioner had waived his right to the presence of counsel during the interrogation. *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Keegan* v. *United States*, 385 F.2d 206 (9th Cir. 1967), Cert. Den., 391 U.S. 967, 88 S.Ct. 2038, 20 L.Ed.2d 880 (1968); *Bond* v. *United States*, 397 F.2d 162 (10th Cir. 1968); *United States* v. *Montos*, 421 F.2d 215 (5th Cir. 1970), Cert. Den., 90 S.Ct. 1262 (1970).

Petitioner also argues that testimony of his prior statements were made without a showing that he knowingly and intelligently waived his right to remain silent. This issue, however, unlike the issue of waiver of petitioner's right to counsel, was not as such presented to the Supreme Court of Missouri on appeal. Respondent believes, therefore, that under Rule 19.1 (a) of the Revised Rules of the Supreme Court of the United States petitioner is not entitled to a writ of certiorari because he is seeking a writ on an issue which was not presented to the state court on appeal.

The evidence on the issue of the waiver of petitioner's right to counsel during interrogation is equally applicable

to the issue of the waiver of petitioner's right to remain silent. While this issue was not properly raised on appeal before the Supreme Court of Missouri, the trial court did find this issue against the petitioner at the close of the interlocutory hearing (Tr. 266-267). Respondent believes that the evidence shows that petitioner was twice advised that he had the right to remain silent, that there was an objective determination that he understood the explanation of that right, and that thereafter petitioner affirmatively stated that he wanted to answer the police officer's questions. This affirmative statement was in essence a waiver by petitioner of his right to remain silent. In addition the mere fact that after being informed of his right to remain silent petitioner knowingly and intelligently continued to actively participate in the interview is also an implicit waiver of petitioner's right to remain silent. *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Therefore, respondent believes that the resolution of this question, though it was determined at the trial court level, is in accordance with the applicable decisions of the Supreme Court of the United States on this issue, and that therefore, even if this issue is considered on its merits, a writ of certiorari should not be granted.

CONCLUSION

For the foregoing reasons respondent believes that the decision by the Supreme Court of Missouri on the issues raised by petitioner in his petition for writ of certiorari are in accordance with the applicable decisions of the Supreme Court of the United States. Therefore, respondent re-

spectfully requests that this petition for writ of certiorari to the Supreme Court of the State of Missouri be denied.

Respectfully submitted,

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